

WOODS PETROLEUM CO.

IBLA 84-733

Decided April 10, 1985

Appeal from a decision of the Casper, Wyoming, District Office, Bureau of Land Management, denying appellant's application for revision of the Shannon Formation Participation Area "B-D" to include the Pine Tree Unit 16-44 well. The Bureau of Land Management determined that Pine Tree Unit 16-44 well was not proven to be reasonably capable of producing unitized substances in paying quantities.

Affirmed.

1. Evidence: Generally--Evidence: Preponderance--Evidence: Sufficiency -- Oil and Gas Leases: Unit and Cooperative Agreements

In determining whether or not a unit well is capable of producing unitized substances in paying quantities a "preponderance of the evidence" standard of proof must be employed. In determining whether or not one has met the applicable standard of proof, this Board will consider the actual standard applied rather than the phrase employed by the factfinder to describe it.

2. Oil and Gas Leases: Unit and Cooperative Agreements

This Board may rely on reports of Departmental technical experts in determining whether or not a unit well is capable of producing unitized substances in paying quantities. A determination by Departmental technical experts will not be set aside where it is not arbitrary or capricious, and is supported by competent evidence.

3. Oil and Gas Leases: Unit and Cooperative Agreements

The Bureau of Land Management practice of deducting overriding royalties from gross revenue in making "paying quantities" determinations is the accepted trade practice, custom, and usage. Where a well established practice or custom is shown to exist, it is assumed

that the parties to a contract intended that practice or custom to apply in the absence of express language in the contract to the contrary.

4. Administrative Procedure: Hearings--Appeals--Evidence: Sufficiency--Hearings--Rules of Practice: Hearings

A hearing is not necessary in the absence of a material issue of fact, which, if proven, would alter the disposition of the matter. A hearing is not necessary where the dispute does not involve facts, but involves the proper application and interpretation of those facts, and the Bureau of Land Management properly reviewed the same information submitted to this Board.

APPEARANCES: Philip G. Dufford, Esq., and Phillip D. Barber, Esq., Denver, Colorado, for appellant; James M. Piccone, Esq., Elizabeth H. Temkin, Esq., Ruth B. Johnson, Esq., and Warren J. Ludlow, Esq., Denver, Colorado, for Sohio Petroleum Company; Ted P. Stockmar, Esq., and Marla J. Williams, Esq., Denver, Colorado, for Gary-Williams Oil Producer.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Woods Petroleum Corporation (Woods) has appealed from a decision of the Casper, Wyoming, District Office, Bureau of Land Management (BLM), dated April 27, 1984, denying its application for revision of the Shannon Formation Participating Area B-D Pine Tree Unit, Campbell and Converse Counties, Wyoming.

On June 29, 1982, appellant filed an application with the Minerals Management Service (MMS), seeking revision by enlargement of the Shannon Formation Participating Area B-D of the Pine Tree Unit. The application was supported by geological and financial data, and was based upon completion and production data relating to Unit well 16-44 (PTU 16-44), which was drilled in the center of the SW 1/4 of sec. 16, T. 41 N., R. 75 W., 6th Principal Meridian. PTU 16-44 was completed within the Pine Tree Unit Area on February 22, 1982.

Sohio Petroleum Company (Sohio) and Gary-Williams Oil Producer (Gary-Williams) objected to appellant's application for revision and asserted that PTU 16-44 was not capable of producing unitized substances in paying quantities.

By the terms of the unit agreement, participating areas may be revised to include additional land "then regarded as reasonably proved to be productive in paying quantities * * *." "Produced in paying quantities" is defined therein as "quantities sufficient to repay the costs of drilling, completing, and producing operations, with a reasonable profit." That definition has not been challenged by the parties, and is not at issue in this case. The sole issue presented is whether the PTU 16-44 well should "then have been regarded [by the District Manager] as reasonably proved to be productive in paying quantities."

From early 1982 to April 27, 1984, Woods, Gary-Williams, and Sohio furnished MMS and BLM with data, information, and economic projections and analyses concerning PTU 16-44. In particular, Woods submitted its profitability analysis dated November 21, 1983. Sohio and Gary-Williams also submitted economic analyses of PTU 16-44. Many conferences were held with MMS and BLM personnel, and 2 years of actual production data concerning PTU 16-44 became available.

Both Sohio and Gary-Williams filed extensive answers to Woods' statement of reasons for appeal, but failed to explain how they would be adversely affected by a reversal of BLM's decision. As the record indicated that neither held any interest in the "B-D Participating Area" of the Pine Tree Unit or in the 16-44 well, this Board issued its order of February 4, 1985, requiring each of them to show cause why they should not be dismissed as parties to this appeal for want of standing. Their responses each indicated that, if the "B-D" area were enlarged by the addition of the 16-44 well, and then if the "B-D" area were consolidated with the "C" and "E" participating areas (in which they do have interests), they would be obliged under the unit agreement to assume their proportionate obligation for well 16-44, which they deem to be a liability rather than an asset.

However, in that scenario the operative decision which would adversely affect the respective interests of Sohio and Gary-Williams would be the decision to consolidate the several participating areas. That decision has not been made, and that issue is not presented by this appeal. The possibility that Sohio and Gary-Williams may be adversely affected in the event of some future contingency, no matter how probable the prospect that the contingency will occur, does not confer standing for their participation as parties to this appeal.

Nonetheless, it is the Board's function to review BLM's decision that the 16-44 well is not capable of producing in paying quantities, and much of the information upon which BLM relied in making that decision was supplied by Sohio and Gary-Williams, and this information is part of the administrative record assembled by BLM. This was entirely proper. In making a "paying quantities" determination, BLM is at liberty to consider data from any source, and this Board must review whatever information served as the basis of the BLM decision.

Accordingly, we conclude that Sohio and Gary-Williams lack standing to participate as parties to this appeal, although the Board can consider the data provided by them to BLM.

According to Woods, the "Minimum Realistic Projection" ("MRP") for PTU 16-44 would indicate a payout period of 8.7 years. Sohio projected that PTU 16-44 would take more than 15 years to reach payout. Gary-Williams concluded that the production projections of both Woods and Sohio were optimistic.

After review of the materials submitted, BLM determined on April 27, 1984, that "Well No. 16-44 had not been reasonably proven capable of producing unitized substances in paying quantities," and denied Woods' application for the revision of Participating Area B-D. BLM premised its decision on the following findings:

1. The predicted performance for Well No. 16-44, as indicated by the latest Profitability Analysis submitted by Woods Petroleum Corporation, is not substantiated beyond a reasonable doubt. This office does not find sufficient support to accept the projected performance for this well, particularly the low decline rate applied over an extended period of time. You indicate that the "minimum realistic projection" curve was developed on your interpretation that as long as the production from Well No. 16-44 is dominated by "linear flow", future production would follow at a minimum a log-log straight line plot. Using data points from the log-log plot, we find that your MRP curve is not based on this data but is a more optimistic interpretation. Further, in reviewing a number of log-log rate versus time plots on Shannon wells in other producing fields with a number of years of production history, we do not see evidence of the migration in the log-log plot above and to the right of the straight line plot as you predict. In fact, the log-log plots do indicate a tendency for the production performance to fall below the straight line plot during the later production life of the well. It is not evident that consideration was given to the effects of increasing GOR's and a two phase-flow system in making your predictions of well performance, especially in the later life of the well. You simply state the performance of Well No. 16-44 in its later producing life should be similar to the decline curve for the Heldt Draw Field. This comparison is entirely too generalized and is not representative of the performance that could be reasonably expected of an individual well basis.

2. The operating costs used in your evaluation are low in comparison to that of other Shannon Fields in the general area. Our review of several fields and associated operating costs for Shannon wells indicates a range of operating costs from \$ 2,000 to over \$ 2,500 per month. As you know, this cost has also been questioned by some of the parties to the agreement who claim the \$ 1,200 figure is too low. The figures given in your analysis cover a relatively short span of time and do not appear to be representative of typical operating costs for the field or give adequate consideration to those costs which only occur periodically in the life of a well.

3. The figures used in your economic evaluation involving gas production from Well No. 16-44 are not representative of the actual gas sales to be expected in the future. It appears you have used figures for the total gas that you estimate will be produced; however, some of the produced gas (approximately 300-400 MCF/month) will not be available for sales but will be used on the lease.

Woods' arguments on appeal include: (1) BLM employed an incorrect standard of proof, therefore, necessitating a hearing on all relevant matters; (2) PTU 16-44 was reasonably proven to be capable of producing unitized substances in paying quantities; (3) BLM erred in rejecting a \$ 1,200 per month operating cost for the subject well; (4) BLM erred in finding that Woods' gas sales projections are not representative of actual gas sales to be expected

in the future; (5) the maximum royalty to be considered in determining burdens on PTU 16-44 is 12.5 percent, and BLM erred in deducting overriding royalties from revenues in determining the paying status of PTU 16-44.

[1] Appellant argues that BLM employed an incorrect standard of proof, necessitating a hearing on all relevant matters. BLM's decision stated that "[t]he predicted performance of Well #16-44, as indicated by the latest Profitability Analysis submitted by Woods Petroleum Corporation, is not substantiated beyond a reasonable doubt." (Emphasis added.) Appellant vigorously objects to BLM's purported application of a reasonable doubt standard. However, in its decision, BLM went on to conclude that "[i]n consideration of the above findings, it is the determination of this office that Well No. 16-44 has not been reasonably proven capable of producing unitized substances in paying quantities." (Emphasis added.) Thus, BLM's decision is somewhat ambiguous as to the identification or description of the standard of proof applied.

Where Congress has not established the degree of proof required in an administrative proceeding, the judiciary is the traditional, and the most appropriate forum to prescribe the standard of proof. *E.g.*, Herman & MacLean v. Huddleston, 103 S. Ct. 683, 691 (1983); Steadman v. SEC, 450 U.S. 91, 95 (1981). Of course, the traditional standard of proof required in a civil or administrative proceeding is proof by a "preponderance of the evidence." *E.g.*, Herman & MacLean v. Huddleston, *supra* at 690; Sea Island Broadcasting Corp. v. FCC, 627 F.2d 240, 243 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 834 (1980); Collins Securities Corp. v. SEC, 562 F.2d 820, 823 (D.C. Cir. 1977); 9 Wigmore, Evidence § 2498 (3d ed. 1940).

The function of a standard of proof is to instruct the factfinder concerning the degree of confidence our society thinks it should have in the correctness of factual conclusions for a particular type of adjudication. The standard of proof serves to allocate the risk of error between litigants and to indicate the relative importance attached to the ultimate decision. Addington v. Texas, 441 U.S. 418, 423 (1979). *See In re Winship*, 397 U.S. 358, 370 (1978) (Harlan, J., concurring). The preponderance of the evidence standard allows both parties to "share the risk of error in roughly equal fashion." Addington v. Texas, *supra* at 423.

In South-East Coal Co. v. Consolidation Coal Co., 434 F.2d 767, 778 (6th Cir. 1970), the Sixth Circuit defined the "preponderance of the evidence" standard:

To establish the preponderance of the evidence means to prove that something is more likely so than not so; in other words, the "preponderance of the evidence" means such evidence, when considered and compared with that opposed to it, has more convincing force and produces in your minds belief that what is sought to be proved is more likely to be true than not true.

See Smith v. United States, 557 F. Supp. 42, 51 (W.D. Ark. 1982); *Jones v. United States*, 239 F. Supp. 474, 480 (E.D. La. 1965), *aff'd*, 358 F.2d 309 (5th Cir. 1966); *Devitt & Black, Federal Jury Practice and Instructions* § 71.14 (3d ed. 1977) (applying same test as in South-East Coal Co., *supra*).

The "preponderance of the evidence" standard must be applied unless the type of case and the sanctions or hardship imposed require a higher standard. Woodby v. INS, 385 U.S. 276, 286 (1965); Collins Securities Corp. v. SEC, supra at 823-26. Higher standards of proof may be required where "important individual interests or rights are at stake." Herman & MacLean v. Huddleston, supra at 691. See, e.g., Snatosky v. Kramer, 102 S. Ct. 1388 (1982). However, the instant case does not involve any especially important individual interests or undue hardship. Thus, a higher standard of proof is not warranted.

In Bender v. Clark, 744 F.2d 1424 (10th Cir. 1984), the Tenth Circuit employed a "preponderance of the evidence" standard in determining whether the Geological Survey erred in finding that a tract of land contained a known geologic structure. In the decision below, this Board employed a "clear and definite" standard of proof. See Jack J. Bender, 54 IBLA 375, 377 (1981). Bender then appealed to the Federal district court contending that the Interior Board of Land Appeals' application of a "clear and definite" standard of proof was improper. The district court held that Bender need only establish that the Government's determination was erroneous by a "preponderance of the evidence." Bender v. Watt, No. 81-682-JB (D.N.M. Dec. 28, 1982). The Tenth Circuit affirmed in Bender v. Watt, 744 F.2d at 1428-30, holding that the "preponderance of the evidence" standard was appropriate. See Irma R. Spear, 84 IBLA 92, 94 (1984). Therefore, in the instant case, BLM was obligated to apply a "preponderance of the evidence" standard.

Appellant seizes upon BLM's use of the phrase "beyond a reasonable doubt" as evidence that BLM employed an improper standard of proof in assessing the paying status of PTU 16-44. However, it is most important to note that BLM went on to conclude that PTU 16-44 was not "reasonably proven" capable of producing unitized substances in paying quantities. This is directly consistent with the provision in the unit agreement, recited above, which requires that it be "reasonably proved" that the additional land will be "productive in paying quantities." BLM's use of the "reasonably proven" language indicates that it was not directly applying the "beyond a reasonable doubt" standard. Moreover, an affidavit of Leo P. Kazola, a petroleum engineer for BLM, who was responsible for determining the paying status of PTU 16-44, indicates that the "preponderance of the evidence" standard was in fact applied.

BLM states in paragraph 1 of its decision that Woods' Minimum Realistic Projection ("MRP") curve was not based upon the data contained in Woods' own log-log plot, and was in fact more optimistic than the log-log data would indicate. This is not a finding that Woods failed to prove its MRP curve beyond a reasonable doubt. This is a finding that Woods' MRP curve is incorrect based on Woods' own log-log plot.

BLM also states in paragraph 1 that it did not see evidence of Woods' contention that production could be expected to yield a curve on the log-log plot that would "fall above and to the right of" the straight line half-slope. BLM concluded that production histories from comparable wells demonstrate a tendency for the production performance to fall below the straight line plot during the later production life of such wells. This is not a finding that Woods' evidence did not constitute proof beyond a reasonable doubt. This is a finding that there was no evidence to support Woods' theory and in fact, the evidence tended to disprove Woods' theory.

With respect to Woods' assertion that PTU 16-44 would perform similarly to the Heldt Draw Field, BLM stated in paragraph 1 that such a comparison is too generalized and not representative of what could reasonably be expected of PTU 16-44. Again, this is not a finding that Woods failed to prove its performance projection beyond a reasonable doubt. This is a finding that Woods' comparison between an individual well and an entire field is not representative of what could reasonably be expected of PTU 16-44.

Throughout its decision, BLM affirmatively found crucial aspects of Woods' projection to be not only unsubstantiated, but incorrect. Even the most generous standard of proof could not undo the affirmative finding that assumptions underlying Woods' projections are contrary to the evidence.

We therefore conclude that BLM properly assessed PTU 16-44 by the appropriate standard of proof. The reference to language of the "beyond a reasonable doubt" standard was technically incorrect, but the underlying decision was premised on the correct "preponderance of the evidence" standard.

[2] Woods asserts that the data it submitted proved that PTU 16-44 was reasonably proven capable of producing unitized substances in paying quantities. Here, BLM's decision and factfinding process was premised on substantial technical analysis. It is well established that this Board may rely on reports of its technical experts without examining the technical data upon which the reports were based. Margaret D. Okie, 43 IBLA 326, 331 (1979). See also Davis Oil Co., 53 IBLA 62, 67 (1981); Corrine Grace, 30 IBLA 296, 300 (1977). This Board often relies on BLM's findings when presented with a highly technical geologic issue. In Amoco Production Co., 41 IBLA 348, 353 (1979), we noted that "[t]he Survey [1/] is the Secretary's technical expert in geologic evaluation and the Secretary is entitled to rely on its reasoned analysis." See Getty Oil Co., 27 IBLA 269, 274 (1976); Arkla Exploration Co., 25 IBLA 220 (1976). The Secretary of the Interior is entitled to rely on the technical determinations of Departmental experts in absence of a showing of error. Amoco Production Co., *supra* at 353. A determination by Departmental technical experts will not be set aside where it is not arbitrary or capricious, and is supported by competent evidence. Davis Oil Co., *supra* at 67; Margaret D. Okie, *supra* at 331. A "paying quantities" determination is certainly a highly technical issue. See Amoco Production Co., *supra*. Courts have often deferred to technical determinations made by administrative agency experts. As noted by the Supreme Court in Federal Power Commission v. Florida Power & Light Co., 404 U.S. 453, 463 (1972):

A court must be reluctant to reverse results supported by such a weight of considered and carefully articulated expert opinion. Particularly when we consider a purely factual question within the area of competence of an administrative agency created by Congress, and when resolution of that question depends on "engineering and scientific" considerations, we recognize the relevant agency's technical expertise and experience, and defer to its analysis unless it is without substantial basis in fact.

1/ In the instant case, MMS and BLM serve as the Department's technical experts.

See Universal Camera Corp. v. NLRB, 340 U.S. 474, 480 n.12 (1951); Environmental Defense Fund v. Andrus, 619 F.2d 1368, 1382 (10th Cir. 1980).

Effectively, Woods' appeal is premised upon its disagreement with BLM's findings of fact. Cf. Fed. R. Civ. P. 52; United States v. United States Gypsum Co., 333 U.S. 364 (1948). However, this is not a sufficient basis to reverse BLM, particularly where, as here, the decision was premised on thorough technical analysis. We therefore conclude that BLM conducted a reasoned analysis which is well supported by competent evidence.

Specifically, Woods asserts that BLM erred in rejecting a \$ 1,200 per month operating cost for PTU 16-44. BLM rejected Woods' estimated average operating cost because "[t]he figures given in your analysis cover a relatively short span of time and do not appear to be representative of typical operating costs for the field or give adequate consideration to those costs which only occur periodically in the life of a well." BLM obviously determined that the \$ 1,200 estimate was not representative of the costs likely to be incurred as the well ages. Woods contends that the "best evidence" of actual operating cost is reflected by 9 and 13 month average costs incurred by PTU 16-44. Instead of relying on the actual operating cost for the PTU 16-44, BLM relied on operating costs for other Shannon wells in the northern part of the Pine Tree Unit. Sohio, which has an interest in these wells, presented a summary of the 1983 operating costs for each of the 37 wells in the unit to BLM for consideration in connection with the PTU 16-44 determination. This summary was compiled from Woods' own records for the relevant wells, as reflected in billings to Sohio. The summary indicates that the average 1983 operating cost for these 37 wells, ranging from 8 years old to those barely in production, was approximately \$ 2,000 per month. Gary-Williams also pointed out to BLM that \$ 2,250 per month may be a more realistic estimate of operating costs given likely future well pulling costs for PTU 16-44.

BLM's primary concern in making a "paying quantities" determination is future performance, not present status. Woods' projected operating costs for the PTU 16-44 is not the "best evidence" on this issue. Conversely, the data presented to BLM by Sohio and Gary-Williams clearly is more probative on the question of likely future costs than are Woods' figures. In considering costs which occur over the life of the well, BLM did not err in refusing to rely on Woods' \$ 1,200 per month estimated operating cost for PTU 16-44.

Woods argues that BLM improperly concluded that Woods failed to account for leasehold gas use in estimating actual gas sales attributable to PTU 16-44. In paragraph 3 of its decision, BLM found that Woods' gas sales projections were not representative of the actual gas sales to be expected in the future. However, the profitability analysis by Gary-Williams explicitly accounts for leasehold gas use and still shows PTU 16-44 to be a noncommercial well. Thus, Woods' argument in this regard is not a sufficient basis for reversal.

[3] Woods asserts that the maximum royalty which should be considered in determining burdens on PTU 16-44 is 12.5 percent. Woods argues that BLM erred in deducting overriding royalties from revenues in determining the paying status of PTU 16-44. Woods cites several cases for the proposition that "overriding royalties are not to be deducted from revenue for 'paying

quantities' determinations." Wrestler v. Colt, 644 F.2d 1342 (Kan. App. 1982); Clifton v. Koonce, 325 S.W. 2d 684 (Tex. 1959); Transport Oil Co. v. Exeter Oil Co., 191 F.2d 129 (Cal. Dist. Ct. App. 1948). However, the cases cited by Woods address the issue of accounting for overriding royalties in the context of whether production in paying quantities exists so as to extend a lease into its secondary term. The issue in the instant case is whether Woods demonstrated that production from PTU 16-44 is sufficient to justify revision of a participating area. Therefore, appellant's contentions and supporting authorities are misplaced. See Yates Petroleum Corp., 67 IBLA 246, 89 I.D. 480 (1982), for a discussion of the distinction between the meaning of "paying quantities" when used in the context of lease extension and when used in the context of unit revision.

In its statement of reasons, Woods admits that "BLM procedures provide that all overriding royalty burdens are deducted from gross production revenues to determine the commercial capability of a unit well." See USGS Conservation Division Manual 645.6.3B (1976). Yet Woods asserts that the BLM procedures are "not a viable practice." In fact, the BLM practice of deducting overriding royalties from gross revenue in determining paying quantities is the accepted trade practice, custom, and usage. The statement in the Conservation Division Manual, supra, of the procedure of deducting overriding royalty burdens expresses the Department's past acceptance of this industry practice.

Uniform Commercial Code § 1-205(2) provides:

A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.

See Nanakuli Paving & Rock Co. v. Shell Oil Co., 664 F.2d 772, 791-793 (9th Cir. 1981); 1 Anderson, Uniform Commercial Code 394-412 (3d. ed. 1981); 5 Williston On Contracts §§ 648-661 (3d ed. 1961); 3 Corbin On Contracts §§ 556-557 (1960). ^{2/} Where a well established practice or custom is shown to exist, it is assumed that the parties to a contract intended that practice or custom to apply, in the absence of express language in the contract to the contrary. E.g., Everett Plywood Corp. v. United States, 512 F.2d 1082, 1089 (Ct. Cl. 1975). "A party is always held to conduct generally observed by members of his chosen trade because the other party is justified in so assuming unless he indicates otherwise." Nanakuli Paving & Rock Co. v. Shell Oil Co., supra at 791. "Parties who contract on a subject matter concerning which known usages prevail, by implication incorporate them into their agreements, if nothing is said to the contrary." Robinson v. United States, 80 U.S. (13 Wall) 363, 366 (1871). Rights and obligations of parties to a contract

^{2/} The Official Code Comments state that trade usage is to be used to reach the "commercial meaning of the agreement which the parties have made. The language used is to be interpreted as meaning what it may fairly be expected to mean to parties involved in the particular commercial transaction in a given locality or in a given vocation or trade." U.C.C. § 1-205:1(4).

must be construed in light of established practice or custom. E.g., Everett Plywood Corp. v. United States, *supra* at 1089. Trade terms, legal terms of art, common words of accepted usage, and terms of a similar nature should be interpreted in accordance with their specialized or accepted usage, unless such an interpretation would produce irrational results. Mellon Bank, N.A. v. Aetna Business Credit, Inc., 619 F.2d 1001, 1013 (3d Cir. 1980). Trade practices are a legitimate way of supplying the inference that one had reason to know a given meaning. United States v. Haas & Haynie Corp., 577 F.2d 568, 573 (9th Cir. 1978). In the instant case, there is no doubt that Woods knew how BLM would treat the overriding royalty burden. Deduction of the overriding royalty burden in these circumstances is a known, accepted trade practice. Therefore, in executing the unit assignment, Woods contracted with reference to this practice. It cannot now complain of the practice.

[4] Woods requests a hearing before an Administrative Law Judge for determination of the commercial capability of PTU 16-44. Woods apparently wishes to rehash the factual determinations which BLM has already made. It offers no showing that an administrative law judge would be better able to make a reasoned decision on the basis of an oral hearing than could BLM or this Board make on the existing record. No offer of further evidence has been made. A hearing is not necessary in the absence of a material issue of fact, which if proven, would alter the disposition of the appeal. E.g., Stickelman v. United States, 563 F.2d 413, 417 (9th Cir. 1977); United States v. Consolidated Mines & Smelting Co., 455 F.2d 432, 453 (9th Cir. 1971); Kim C. Evans, 82 IBLA 319, 323 (1984). This Board "should grant a hearing when there are significant factual or legal issues remaining to be decided and the record without a hearing would be insufficient for resolving them." Stickelman v. United States, *supra* at 417. In the instant case, the record does not reflect any significant factual or legal issues which warrant an oral hearing. In the context of a paying quantities determination, this Board has refused to grant a hearing where Geological Survey had reviewed the same information submitted to this Board and the dispute did not involve facts, but involves the proper application and interpretation of those facts. American Resources Management Corp., 40 IBLA 195, 200 (1979). Here, Woods relies on the same data as were presented to BLM. The critical issue involves future probabilities in light of the assessment and interpretation of an array of technical data and projections. As in American Resources Management Corp., a hearing would serve no useful purpose and is not warranted. We therefore deny Woods' request for a hearing.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Edward W. Stuebing
Administrative Judge

I concur:

R. W. Mullen
Administrative Judge.

ADMINISTRATIVE JUDGE ARNESS CONCURRING IN PART, DISSENTING IN PART:

I agree the Bureau of Land Management (BLM) determination that Pine Tree Unit well 16-44 was not proven reasonably capable of producing in paying quantities is correct. It is error, however, to dismiss Sohio and Gary-Williams as parties to this appeal; their participation was and is necessary to a full and complete administrative adjudication of the matter.

This appeal arises from a decision which was the direct result of a successful protest by Sohio and Gary-Williams to Woods' application for revision of participating area "B-D" to the Pine Tree Unit. Had the Sohio and Gary-Williams objections concerning the character of well 16-44 been rejected, there can be no doubt that they would have been able, as parties adversely affected by a BLM decision, to maintain an appeal to this Board. See 43 CFR 4.410. Sohio and Gary-Williams, however, were successful in the presentation of their case before BLM; there are numerous legal and practical reasons why they should be permitted to continue to defend the position before this Board which they have thus far established in proceedings before BLM.

First, as a practical matter, their participation as parties is necessary to the establishment of a complete record to permit decisionmaking. Although BLM is responsible for the administration and regulation of federally owned oil and gas resources, it does not directly produce the resources itself, but must rely upon commercial developers for technical data and factual information concerning the production from wells on Federal lands. In cases where, as here, a legal decision affecting the private owners and operators working a producing field is required to be made based upon highly technical engineering data, it is unavoidable that reliance must be placed upon information and analyses obtained from commercial developers engaged in the actual extraction of oil and gas from the field.

Sohio is a party to the Pine Tree Unit agreement; although it owns no wells in the proposed "B-D" Participating Area which is the subject of this appeal, it does own wells in other participating areas within the unit. Gary-Williams is a working interest owner in the Pine Tree Unit; although it owns no interest in the proposed "B-D" revised area, it also has interests in other participating areas of the Pine Tree Unit. Woods, the unit operator, has proposed the inclusion of additional land in a participating area based upon the assertion that well 16-44 is capable of producing oil and gas in paying quantities. Notice of this proposal was given to the Pine Tree Unit owners pursuant to Article 5 of the Unit Operating Agreement which provides, pertinently: "Unit Operator shall initiate each proposal for the establishment or revision of a participating area by submitting the proposal in writing to each party at least 20 days before filing the same with the Supervisor." Thereafter, following notice given and continuing over a 2-year period, Woods, Sohio, and Gary-Williams submitted data, analyses, and arguments to BLM in an effort to persuade the agency concerning the production capability of well 16-44, the issue which is central to a decision of this case. Meantime, however, on July 12, 1982, Woods had submitted an application to combine participating areas. Under this proposal, the revised area "B-D" would be combined with areas in which both Sohio and Gary-Williams do hold interests. The effect of such a combination, as both Sohio and Gary-Williams point out, would be to require sharing of expenses and revenues of wells within the combined area.

Thus, if well 16-44 proved to be not capable of producing oil and gas in paying quantities, the effect of such a combination of participating areas would be to lower the income from Sohio and Gary-Williams properties, and conversely, to cut the losses associated with Woods' well 16-44.

The determination that a well is or is not capable of producing in paying quantities is a crucial event in the development of a unit. The unit agreement, which is a form agreement required by Departmental regulations 43 CFR 3180.0-5, 3186.1, requires that, to be included in a participating area within the unit, land must be capable of producing oil or gas in paying quantities. This determination is an estimate based in large part upon engineering data relating to each new well which becomes part of a pool of data for the entire unit. As a result, the determination that a well is a commercial producer has an effect which extends beyond the immediate question of the inclusion of the well into a participating area or the inclusion of that area into the unit. The record in this case demonstrates that new wells coming into production will be compared and analyzed in relation to existing wells for the purpose of evaluating the potential of the new wells.

The leading opinion dealing with standing to participate as a party in an appeal before this Board is California Association of Four Wheel Drive Clubs, 30 IBLA 383 (1977). In that case BLM's California State Director proposed to close the Imperial Sand Dunes to vehicular traffic. When the Four Wheel Drive Club appealed the Director's action, BLM moved to dismiss the club's appeal, contending the club was not a proper party within the meaning of the regulations governing appeals at 43 CFR 4.410. The Board held that the club, whose members had actually used the land from which they would have been excluded by the Director's decision, had a sufficient interest to permit them to be heard as parties in opposition. The proper test to be applied to determine standing to appear as a party in an administrative proceeding before this Board is explained by the Board's decision, adopting a statement of principle formulated by a Federal district court opinion, as:

[W]here an individual or group such as the Citizens' Committee uses the Federal land in question and is recognized by the Federal Land Management as a bona fide representative of the community and is provided with notice of all proceedings and actions by the Bureau of Land Management regarding the land in question, and actively and extensively participates in formulating land use plans for the land in question, and takes the position in a dispute concerning the use of the land in question contrary to another individual or group, that individual or group is a party within the meaning of 43 C.F.R. 4.410.

30 IBLA 386 (1977). Both Sohio and Gary-Williams meet all the announced criteria for standing: They are members of an affected community (Pine Tree Unit); they were provided with, and responded to, notice of the proposed action; they participated in formulating the decision concerning the proposed revision; and they protested revision, alleging it was contrary to the unit agreement and Departmental regulations. Indeed, they were recognized as proper parties to this appeal by Woods when it served them with notice of the appeal to this Board. Standing was not an issue in this appeal until the parties were ordered by this Board, acting on its own motion on February 4, 1985, to

show cause why they should not be denied standing to participate in this appeal as parties.

The majority take the position that, because Sohio and Gary-Williams have no direct property interest in the "B-D" area, they lack standing. This position is incorrect for several reasons: First, it ignores actual, continuing participation by both Sohio and Gary-Williams in the formulation of the BLM decision appealed from and in this pending appeal. (It should be noted that the majority make a point of saving the data provided by Sohio and Gary-Williams to BLM in the course of administrative proceedings before the Bureau as part of the record. This action, of course, is an admission that both parties are necessary to this appeal, for without their contributions to the record BLM's decision might not be sustained. At this point, it is impossible to identify which portions of the record were supplied by the parties and what parts can be said to be the independent work of BLM investigation or research). Second, it has the effect of shifting the burden of proof in future cases of this sort. The decision by the majority would require that unit participants, not having a direct property interest in a new well or within its participating area, should be obligated to wait until a BLM determination is made concerning the well's capacity before raising objections to a proposal for revision based upon the well's performance. Thus, as the proponent of the assertion that well was not a commercial producer, the challengers would be in a position where they would need to overturn an existing agency determination.

The determination that a well is capable of producing in paying quantities, once made, would certainly be more difficult to overturn, than it would be to show that a well was not a commercial well, prior to a BLM decision. This fact of administrative procedure is recognized by the Geological Survey Conservation Division Manual, which states, flatly: "[A]ny doubts as to whether or not a tract should be placed in a participating area should be resolved against participation since a participating area can be enlarged easier than it can be reduced." Manual, supra at 645.1.3F. In this case, at least up to this point, Woods, as the proponent of the revision of area "B-D" was obliged to show that well 16-44 was able to produce in paying quantities as a matter of engineering probability. Clearly where the establishment of a specific standard, the capability to produce in paying quantities, is the sole issue at stake, the entity contending that such production has been achieved should be obliged to prove it. The clear intent of the unit operating agreement is to require the proponent of a revision or enlargement to establish the basis for the proposed change. Because of the existence of the unit association, and the interest all unit members have in the inclusion of new properties, therefore, any participant should be, and is, in a position to object to proposed revisions which are seen to be unmeritorious.

An odd effect of the majority opinion is, of course, to enable only property owners within the proposed revised area to object to revision. They, however, are unlikely to do so in any event, since if the well or wells upon which a revision is to be made are marginal or unlikely to pay back their costs, then, more than ever, it is to the advantage of such owners to share their losses with other unit participants. They would be unlikely to object, regardless of the potential of any proposal.

Moreover, the notion that a direct property right is needed in the land which is the subject of an administrative action in order to confer standing as a party was rejected in In re Pacific Coast Molybdenum Co., 68 IBLA 325 (1982). There it was contended that two environmental organizations lacked standing to appeal from rejection of protests which they had made to issuance of patents to mining claims. The Board rejected that argument, and held that, where the two clubs concerned had filed timely protests against patent issuance, alleging violation of the mining laws by the patent applicant, the organizations properly appeared as parties despite the fact that they held no adverse claim to property rights in the disputed claims. See 68 IBLA 330, 331 (1982).

The majority opinion is also wrong when it implies that one must wait for actual injury to occur before a protest of a proposed Departmental action can be made ("the event of some future contingency, no matter how probable * * * does not confer standing," infra at). Seen in this perspective, their holding might be said to be based upon a determination the matter is not ripe for review, as concerns Sohio and Gary-Williams. Just the reverse is true. This Board has adopted a requirement that one must not sleep on his rights, but must proceed promptly to represent known interests if he is to retain standing as a party. The observation in the court's opinion at Red River Broadcasting Co. v. F.C.C., 98 F.2d 282, 286-87, (D.C. Cir.), cert. denied, 305 U.S. 625 (1938), quoted with approval in Western Slope Gas Co. (On Reconsideration), 43 IBLA 259, 260 (1979) explains this rule:

The right to administrative relief is a privilege afforded by law to persons who consider themselves interested or aggrieved. * * * The burden * * * is * * * upon an interested person to act affirmatively to protect himself. * * * Such a person should not be entitled to sit back and wait until all interested persons who do so act have been heard, and then complain that he has not been properly treated. To permit such a person to stand aside and speculate on the outcome; if adversely affected, come into the court for relief; and then permit the whole matter to be reopened in his behalf, would create an impossible situation.

In this case there is no question that Woods sought to consolidate its well 16-44 into the Pine Tree Unit, thus, directly affecting Sohio and Gary-Williams; Woods' July 12, 1982, application establishes that for a fact. Even were this fact not so clear, however, the proposed revision of area "B-D" to include well 16-44 was an event in which Sohio and Gary-Williams had an interest. Their standing as parties was demonstrated by their past participation in this matter before the Department, and was recognized by Woods until this Board called the matter into question. Their right to participate as parties should not be denied; at the very least they should be permitted to intervene in this appeal.

Franklin D. Arness
Administrative Judge

